

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREATER ENTERPRISES, LLC,)

Plaintiff,)

vs.)

SELECT MARKETING GROUP, LLC,)

Defendant.)

Case No.: 2:12-cv-00221-GMN-PAL

ORDER

This action was originally filed before this Court by Plaintiff Greater Enterprises, LLC (“GE”) against Defendant Select Marketing Group, LLC (“SMG”). Before the Court is GE’s Motion to Dismiss (ECF No. 22) SMG’s Counterclaim. Also before the Court is SMG’s Motion for Judgment on the Pleadings (ECF No. 27) and Motion for Leave to File (ECF No. 38) a First Amended Answer, Affirmative Defenses, and Counterclaim Together with a Third Party Complaint. All motions have been fully briefed.

I. BACKGROUND

GE filed its initial Complaint (ECF No. 1) on February 13, 2012, and then SMG filed its Answer, Affirmative Defenses, and Counterclaim (ECF No. 6) on March 7, 2012. GE responded by filing a Motion to Dismiss (ECF No. 8) SMG’s claims on April 2, 2012, and then filed a Motion for Leave to File a First Amended Complaint (ECF No. 13) on April 25, 2012. On May 17, 2012, United States District Judge James C. Mahan granted GE’s request to amend, filing GE’s First Amended Complaint (ECF No. 17). The action was then transferred to Judge Gloria M. Navarro and assigned to the Patent Pilot Program for the United States District Court for the District of Nevada. (ECF No. 18.) A corrected First Amended Complaint (ECF No. 19) was also filed. SMG filed its Answer, Affirmative Defenses, and Counterclaim

1 to Plaintiff's First Amended Complaint (ECF No. 21) on June 8, 2012, and GE filed the instant
 2 Motion to Dismiss (ECF No. 22) on June 22, 2012. SMG filed the instant Motion for Judgment
 3 on the Pleadings (ECF No. 27) on July 17, 2012, and then filed the instant Motion for Leave to
 4 File (ECF No. 38) on August 16, 2012. Currently, discovery is due by April 2, 2013, and
 5 motions are due by May 2, 2013. (Scheduling Order, ECF No. 54.)

6 **II. DISCUSSION**

7 Rule 15 of the Federal Rules of Civil Procedure provides for amended and supplemental
 8 pleadings. Fed. R. Civ. P. 15. Where the time has expired for a party to amend its pleading as a
 9 matter of course, "a party may amend its pleading only with the opposing party's written
 10 consent or the court's leave." Fed. R. Civ. P. 15(a)(2). As stated by the Supreme Court in
 11 *Foman v. Davis*:

12 Rule 15(a) declares that leave to amend "shall be freely given when justice so
 13 requires"; this mandate is to be heeded. If the underlying facts or
 14 circumstances relied upon by a plaintiff may be a proper subject of relief, he
 15 ought to be afforded an opportunity to test his claim on the merits. In the
 16 absence of any apparent or declared reason – such as undue delay, bad faith
 17 or dilatory motive on the part of the movant, repeated failure to cure
 18 deficiencies by amendments previously allowed, undue prejudice to the
 19 opposing party by virtue of allowance of the amendment, futility of
 20 amendment, etc. – the leave sought should, as the rules require, be "freely
 given." Of course, the grant or denial of an opportunity to amend is within
 the discretion of the District Court, but outright refusal to grant the leave
 without any justifying reason appearing for the denial is not an exercise of
 discretion; it is merely abuse of that discretion and inconsistent with the spirit
 of the Federal Rules.

21 371 U.S. 178, 182 (1962) (internal citation omitted).

22 Upon review of the briefs and the litigation history of this case, the Court finds that
 23 leave to amend is justified, and will grant SMG's Motion for Leave to File (ECF No. 38).
 24 Because GE's Motion to Dismiss (ECF No. 22) does not address the claims in SMG's proposed
 25 amended pleading (Ex. A to Mot. for Leave to File, ECF No. 38), the Court denies the motion

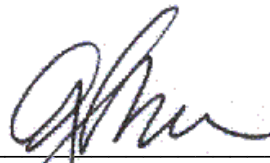
1 as moot with leave re-file so as to fully brief the grounds for dismissal. Likewise, SMG's
2 Motion for Judgment on the Pleadings (ECF No. 27) is based upon pleadings that are not now
3 the operative pleadings before the Court; therefore, the Court will deny that motion as moot
4 with leave to re-file based upon the currently operative pleadings before the Court. The parties
5 are given leave to request amendments to the Scheduling Order (ECF No. 54).

6 **III. CONCLUSION**

7 **IT IS HEREBY ORDERED** that the Motion for Leave to File (ECF No. 38) is
8 **GRANTED**. SMG is directed to file its pleading at Exhibit A to the motion by **Monday, April**
9 **8, 2013**.

10 **IT IS FURTHER ORDERED** that the Motion to Dismiss (ECF No. 22) and the Motion
11 for Judgment on the Pleadings (ECF No. 27) are **DENIED as moot**.

12 **DATED** this 29th day of March, 2013.

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Gloria M. Navarro
United States District Judge
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